



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Leo Moran Construction Co.

File: B-229676

Date: March 11, 1988

DIGEST

1. Protest is untimely where filed with General Accounting Office more than 10 working days after protester learned of adverse agency action following protest to the agency.

2. General Accounting Office (GAO) will not consider the merits of an untimely protest under either the significant issue or good cause exceptions to GAO timeliness requirements where there has been no showing of a compelling reason beyond the protester's control that prevented the timely filing of the protest and the protest does not present a unique issue of widespread interest to the procurement community.

DECISION

Leo Moran Construction Co. protests the award of a contract to NIS General Construction Co., Inc., under invitation for bids (IFB) No. DAAA21-87-B-0126, issued by the Department of the Army for all labor, materials, and equipment for the facility renovations and additions to Building 120 at Picatinny Arsenal.

We dismiss the protest.

The solicitation requested separate prices on a base item for renovations plus an option item for a building addition, with award to be based on a "grand total" price for both items. Moran contends that the Army improperly determined NIS to be the low bidder because NIS's grand total price was lower than the sum of its two separate item prices. The Army maintains that NIS's lower total price merely represented a discount in the event NIS was awarded both items, and that the award based on that total price therefore was proper.

The protester sent a letter dated September 30 to the agency in which it questioned the award, and which it alleges was intended as a protest. The contracting officer states that

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he told Moran by telephone on October 1 that its protest was without merit. Moran denies that the contracting officer orally denied the protest at this time, and also asserts that the contracting officer asked for and received Moran's agreement to allow the agency to handle the protest rather than protest to our Office. (The contracting officer denies any such request or agreement.) On October 28, a debriefing was held, at which the protester and the Army discussed the matter, and the Army states that it reiterated the basis for denial of the protest at this time. Moran does not dispute this account, stating only that it was told that no Notice to Proceed yet had been issued to the awardee.

On November 6, at another meeting, the same issues were discussed and the Army restated that its position was unchanged and the protest without merit. Moran has not disputed this account either, but again adds that the agency's attorney stated at the meeting that no Notice to Proceed had been issued. In a letter dated November 17, the agency issued a written denial of Moran's protest. On November 24, Moran filed this protest with our Office.

Our Bid Protest Regulations provide that, to be deemed timely, a protest must be filed within 10 working days after the basis for protest is known or should have been known, unless a protest was filed initially with the contracting agency, in which case a subsequent protest to our Office must be filed within 10 working days of the protester's actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(2) and (3) (1987).

Even assuming, as Moran asserts, that no adverse agency action occurred on October 1, it is undisputed that at the October 28 debriefing and the November 6 meeting, the protester was that by the agency considered the protest to be without merit. This constituted initial adverse agency action on Moran's September 30 letter complaining about the award. Moran relies on the nonissuance of a Notice to Proceed as evidence that the agency had not yet rejected Moran's position, and was still considering the protest up until the written denial on November 17. However, the fact that the agency was willing to continue discussing its position until November 17 does not diminish the controlling effect of its initial notice to Moran of its position. The protester may choose to continue pursuing a protest at the agency level after initial adverse agency action, but it is well-established that doing so in no way extends the time limit for filing with our Office. See Singapore Aircraft Industries, B-229751, Dec. 30, 1987, 87-2 CPD ¶ 647; Art Specialty Co., Inc.--Reconsideration, B-224130.2,

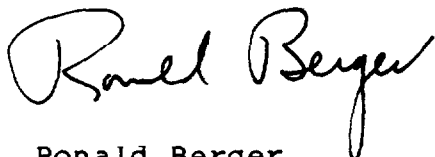
Sept. 15, 1986, 86-2 CPD ¶ 301. It is clear from the record, therefore, that whether initial adverse agency action occurred on October 28 or November 6, Moran's November 24 filing was untimely.

The protester argues that even if its protest is found untimely, it raises issues significant to the procurement system and therefore should be heard pursuant to the exception to our timeliness rules at 4 C.F.R. § 21.2(c). However, we consider untimely protests under the significant issue exception only when the matter raised is one of widespread interest to the procurement community and has not been considered on the merits in previous decisions. Joseph E. Carter--Reconsideration, B-227094.3, Dec. 22, 1987, 87-2 CPD ¶ 615. We have previously addressed issues similar to those raised here concerning alleged bid price inconsistencies resulting from the totaling of bid items. See, e.g., Curtiss Development Co. and Shipco, Inc., 61 Comp. Gen. 85 (1981), 81-2 CPD ¶ 414. In any case, we do not consider the issue raised to have significance beyond the procurement in question.

Moran also submits that we should rule on the merits of its protest pursuant to the "good cause" exception to our timeliness rules, 4 C.F.R. § 21.2(c), since the Army allegedly misled Moran into not filing with us and misrepresented that it would consider and decide the protest locally. Even assuming that Moran's assertions are correct (the Army, as indicated, denies having misled Moran), we have held that the fact that a protester may have been misled by an agency does not alter the untimeliness of its protest. Pacific Propeller, Inc., B-229868, Dec. 30, 1987, 87-2 CPD ¶ 649.

Moran's claim for bid preparation costs and attorney's fees is also dismissed because our Office does not consider such claims in relation to a protest not heard on the merits. ITT Gilfillan, B-225781, May 8, 1987, 87-1 CPD ¶ 495.

The protest and claim are dismissed.



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